80-1126

NO.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1980

THE TAGGART CORPORATION, STANLEY M. KANSAS AND CLAIRE JEAN KANSAS

Petitioners

VERSUS

E. ROBERT EFROS, JAMES A. MARKLE, WILLIAM K. ROBINSON, OLD SECURITY LIFE INSURANCE COMPANY, DURHAM LIFE INSURANCE COMPANY, SECURITY INSURANCE SERVICES, AND LIFE AND HEALTH BENEFITS ADMINISTRATION, INC.

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the decision of the United States Court of Appeals in affirming the District Court decision to deny jurisdiction to Petitioner is in direct conflict with ERISA statutes and congressional intent and constitutes a denial of due process to the class of employees that would have thus been covered.

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IN THE
SUPREME COURT OF THE UNITED STATES

TERM, 1980

THE TAGGART CORPORATION, STANLEY M. KANSAS AND CLAIRE JEAN KANSAS

VERSUS

E. ROBERT EFROS, JAMES A. MARKLE, WILLIAM K. ROBINSON, OLD SECURITY LIFE INSURANCE COMPANY, DURHAM LIFE INSURANCE COMPANY, SECURITY INSURANCE SERVICES, AND LIFE AND HEALTH BENEFITS ADMINISTRATION, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Taggart Corporation, a Plaintiff in the captioned cause respectively prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 30, 1980 (original decision) and on August 29, 1980 (denial of rehearing).

CITATIONS TO OPINIONS BELOW

The judgment and opinion of the District Court are reported at 475 F.Supp. 124 and are reproduced in the supplement at Appendix 1, Brief page A-1. The opinion of the United States Court of Appeals for the Fifth Circuit dated May 30, 1980 (Circuit Judges, Hill, Garza and Clark), is reproduced in the supplement beginning at Appendix 2, Brief page A-8 and is reported in F2d 6011. The opinion of the United States Court of Appeals for the Fifth Circuit denying rehearing, dated August 29, 1980 is reproduced in the supplement beginning at Appendix 3, Brief page A-15.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit denying rehearing in this case was entered on August 29, 1980. This petition of certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 USC Section 1254(1), 62 Stat 928.

STATEMENT OF THE CASE

Plaintiffs-Appellants, THE TAGGART CORPORATION (Taggart), STANLEY M. KANSAS, and CLAIRE JEAN KANSAS, filed this suit against Defendant-Appellee, LIFE AND HEALTH BENEFITS ADMINISTRATION, INC., (LHBA), on September 23, 1977, in the United States District Court for the Southern District of Texas, Houston Division. Plaintiffs sought relief for breaches of duty by Defendant as administrator of an employee benefit plan and for the wrongful termination of benefits under the plan. Plaintiffs alleged

that the District Court had jurisdiction under sections of the Employee Retirement Income Security Act of 1974 (ERISA) codified at 29 U.S.C. §1001 et seq.

Defendant LIFE AND HEALTH BENEFITS ADMINISTRATION, INC., filed its answer on November 10, 1977. On October 4, 1978, the Court held a conference at which it granted Plaintiffs leave to amend their complaint. Plaintiffs filed their amended complaint on October 10, 1978, joining E. ROBERT EFROS, JAMES A. MARKLE, WILLIAM K. ROBINSON, DURHAM LIFE INSURANCE COMPANY, OLD SECURITY LIFE INSURANCE COMPANY, and SECURITY INSURANCE SERVICES as parties Defendant. Plaintiffs additionally requested class certification.

Defendants LIFE AND HEALTH BENEFITS ADMINISTRATION, INC., and JAMES A. MARKLE filed their Answer to the Amended Complaint on November 16, 1978. On December 6, 1978, Defendant DURHAM LIFE INSURANCE COMPANY filed its Answer to the Amended Complaint.

On December 8, 1978, Defendants LIFE AND HEALTH BENEFITS ADMINISTRATION, INC., and JAMES A. MARKLE filed a Motion to Dismiss and alternatively a motion for Summary Judgment alleging that the District Court lacked subject matter jurisdiction. Plaintiffs responded on December 11, 1978. At the Court's request, Defendants submitted a supplemental memorandum regarding their Motion to Dismiss on August 6, 1979. Plaintiffs responded on August 15, 1979.

On August 21, 1979, the Court filed a Memoran-

dum and Order granting Defendants' Motion to Dismiss for lack of subject matter jurisdiction. Plaintiffs filed their Notice of Appeal on September 20, 1979. The Final Judgment was filed September 21, 1979. The Record was filed with the Clerk for the United States Court of Appeals for the Fifth Circuit on October 3, 1979.

On May 30, 1980 the United States Court of Appeals for the Fifth Circuit filed an opinion affirming the Dismissal for Lack of Jurisdiction. On June 10, 1980 a Motion for Extension of time to file petition for rehearing was filed and granted.

On July 14, 1980 Plaintiffs-Appellants filed a petition for rehearing with the United States Court of Appeals for the Fifth Circuit. On August 29, 1980 the petition for rehearing was denied by the United States Court of Appeals for the Fifth Circuit.

FACTS

Appellees E. ROBERT EFROS and WILLIAM K. ROBINSON originally established the Security Multiple Employers Trust in Arizona. Appellees Efros, Robinson, and James A. Markle then set up in Texas a similar Security Multiple Employers Trust (SMET) which is the subject of this suit. Appellee LHBA was named as administrator of the SMET. SMET through its appointed administrator, LHBA was designed to serve as the administrator of an ERISA-covered plan. SMET's role could be paralleled to that of a conduit for the insurance premiums and

claims arising from the policies it held in trust for the various employer.

Appellant Taggart was incorporated in November, 1975. Kenneth J. Bozak was the majority stockholder and Appellant Stanley M. Kansas was the minority stockholder, as well as the corporation's President and employee. The Board of Directors of Taggart approved a proposal to establish an employee benefit plan as an incentive to its present and future employees. After considering various options, Taggart executed a Subscription Agreement to become a subscribing employer in the SMET. Taggart became a subscribing employer on May 1, 1976. LHBA notified Taggart that it was a member of an ERISA covered plan.

Taggart's employee, Stanley M. Kansas, and his family were covered by the group insurance purchased by the SMET until June 24, 1977, when LHBA informed them that the coverage was being cancelled retroactively. Appellants subsequently filed this suit for violations of ERISA and other breaches of fiduciary duty.

JURISDICTION OF THE COURT BELOW

Jurisdiction of this action is grounded upon 29 U.S.C. §1001 et seq, the Employment Retirement Income Security Act of 1974, which extends jurisdiction to the protection of employee benefit plans.

REASON FOR GRANTING CERTIORARI

THE IMPORTANCE OF THE JURISDICTIONAL QUESTION OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 AND THE DEVASTATING IMPACT OF THE

DECISION OF THE COURT OF APPEALS ON THE RIGHTS AND PROTECTION GRANTED BY CONGRESS TO EMPLOYEE BENEFITS PLANS BASED ON INSURANCE ARRANGEMENTS

Even though many cases relating to employee benefits have been presented before this Honorable Court, the jurisdictional question involved in this case has not yet been answered by this Court and dependent on its resolution are serious social consequences to the nation's employers, employees and insurance industry.

The Employee Retirement Income Security Act (ERISA) of 1974 was enacted to protect the interest of participants in Employee Benefit Plans and their beneficiaries. *Marshall v. Snyder* 430 F. Supp 1224, (D.C. NY 1977) *aff. in part and remanded* 572 F.2d 894. Since the Act represented a comprehensive remedial effort to protect participants and beneficiaries, a complaint charging a violation should not be lightly dismissed *Marshall v. Graft* 463 F. Supp. 493, (D.C. Ga).

ERISA was enacted as a relacement of the Welfare and Pension Plans Disclosure Act (WPPDA), 29 U.S.C. § 301, et seq, which was enacted in 1958, to exercise regulatory controls over pension and welfare funds. Whereas the main thrust of ERISA as described in the U.S. Code Cong. and Am News for Pub-L 93406 at p. 4639 was to remedy certain defects in private retirements systems relating to vesting and funding of pension plans which limited the effectiveness of the system, Congress essentially reenacted the corresponding sections of WPPDA into ERISA in regards to welfare plans. Therefore, the

WPPDA's legislative history serves best to show Congress' purpose in establishing both WPPDA and ERISA in regards to welfare plans (See Pub. L. 85-836, 1958 U.S. Code Cong. and Adm. News, p. 4137).

And Congress defined in the WPPDA legislative history the following benefits as constituting welfare plans:

> "Welfare plans include benefits such as group life insurance, disability benefits, medical care, accidental death and dismemberment, hospital, surgical, other medical benefits and unemployment benefits.
>
> S. Rep 1440, reprinted in 1958 U.S. Code Cong. and Admin. News 4143.

At p. 4146 of the 1958 U.S. Code Cong. and Ad. News, Congress clearly stated that its intent in enacting WPPDA was to solve the problems of administrators' abuses and mismanagement, improper insurance practices and the inadequacies of safeguards for employee benefits under existing federal and state laws. At page 4142 of Conference Report No. 2656 of 1958 Congress referred to 1954 statistical data to show its concern about the vital impact of insured employed benefit plans and to document the importance of such plans for the nations' employees.

Proportion of Labor Force in Private Industry that is Covered Under Private Employee Benefit Plans by Type of Benefits; 1954

WELFARE PLANS	
Death	55%
Temporary Disability	43.6%
Hospitalization	59%

Surgical	53%
Medical	32%

In these trying times for the nation's economy, there is no doubt that ERISA becomes vital to the protection of the employees' benefits. In the same light, trusts such as SMET and insured employee benefit plans in general are becoming more prevalent and if not properly controlled by ERISA, will be left unchecked by federal or state law. The obvious potential will then exist for mismanagement and theft of the nation's employees welfare benefit plans.

In enacting ERISA, Congress stated in the 1974, U.S. Code Cong. and Ad. News at page 4642 that one of the main reasons for the creation of WPPDA's and ERISA's regulatory control over fiduciaries of pension and welfare funds was the lack of any federal or state fiduciary or trust law to protect the employee's benefits from fiduciary abuse. Even state insurance laws were deemed inadequate by Congress to deal with the breach of fiduciary duties involved in these situations.

The Court of Appeals in its opinion states that its decision leaves appellants free to pursue their insurance claims in an appropriate state Court. Even though the above statement is accurate, it does not apply to Appellants' present claim regarding a breach of fiduciary duty which is not regulated by state insurance laws. Indeed, protection was granted to employee benefits by Congress under the federal law of WPPDA and ERISA because of the inadequacy of state insurance and trust laws to deal with this national problem.

By its decision, the Fifth Circuit Court of Appeals is denying Appellants' only avenue of redress and negating the underlying premise of this statute as expressed in the legislative history of the WPPDA and as reprinted in 1958 U.S. Code Cong. and Admin. News at p. 4147: "the need to cover all types of welfare and pension plans under this statute's protection". By its decision, the Court of Appeals is excluding from coverage the most commonly used type of employee welfare benefit plan, the insured plan.

THE DECISION OF THE UNITED STATES COURT OF APPEALS REJECTING THE VALIDITY OF THE TAGGART PLAN AS AN EMPLOYEE WELFARE BENEFIT PLAN WAS SO ARBITRARY AND CAPRICIOUS AS TO CONSTITUTE A DENIAL OF DUE PROCESS

In *Canty v. Board of Education, City of New York*, 312 F. Supp. 254, (D.C.N.Y.) the Court said:

> "The terms 'arbitrary' and 'capricious' embrace a concept which emerges from the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution and operates to guarantee that acts of the government will be grounded on established legal principals and have a rational factual basis. A decision is arbitrary, and capricious when it is not supported by evidence or when there is no reasonable justification for the decision".

In its affirmance of the District court's denial of jurisdiction, the Court of Appeals stated:

> "Considering the history, structure and purposes of ERISA, we cannot believe

> that that Act regulates bare purchases of health insurance where, as here, the purchasing employer neither directly nor indirectly owns, controls, administers, or assumes responsibility for the policy or its benefits".

But in reality, the Taggart Corporation, through its subscription to SMET assumes responsibilities for the policy and its maintenance through the payment of premiums and administrative costs for the benefit of its employee, Stan Kansas. Indeed, without the employer's subscription, there would be no insurance policy and therefore no benefits to its employee, and thus no employee benefit plan. Furthermore, the Taggart Corporation controls the policy through the trust agreement which gives the Taggart Corporation and other employees the power to replace the trustees and even terminate the trust.

The Appeals Court further states:

> "The supposed Taggart 'plan' has no assets and is liable for no benefits. There is nothing to be placed in trust, so there is no trust. The corporation did no more than make payments to a purveyor of insurance, patently for tax reasons".

Why the Court of Appeals does not consider insurance policies as assets and why it does not recognize the SMET as holding these assets in trust escapes reasonable comprehension. Appellants and the Department of Labor have shown repeatedly to this Court in their various briefs that ERISA coverage does recognize all employee benefit plans created through insurance policies. The definition of an "employee

welfare benefit plan" found at 29 U.S.C. §1002(1) and quoted by the Court of Appeals in its opinion states this point most concisely:

> "any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, *through the purchase of insurance or otherwise.* (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment. . ." (emphasis added)

Additionally section 29 U.S.C. §1103(b)(1) states:

> "the requirements of subsection (a) (as to assets being held in trust) of this section shall not apply - (1) to any assets of a plan which consist of insurance contracts or policies issued by an insurance company qualified to do business in a state" (material within parentheses added)

Accordingly, the Taggart Plan does possess assets in the form of the insurance policies which are held in trust by SMET, even though this trust would not even be necessary under the insurance policy exception of 29 U.S.C. 1103(b)(1).

Additionally as was stated in the Department of Labor's Amicus Curiae brief in support of Appellants petition for rehearing, the legislative history of the WPPDA (from which

the ERISA definition of "employee welfare benefit plan" was derived) makes clear that Congress intended this definition to emcompass arrangements whereby welfare benefits for employees were provided by means of insurance:

> "Employee-benefit plans may be insured, funded, through the medium of a trust, or operated on a pay-as-you-go basis. Most employee welfare plan benefits are insured with a commercial insurance company of the Blue Cross-Blue Shield type of operation. Pension plans are usually funded through a contract with an insurance company, or by an independent trust established generally in the hands of a corporate trustee
> S. Rep 1440, reprinted in 1958 U.S. Code Cong. and Admin. News 4143.

Furthermore, in *Wirtz v. Gulf Oil Corporation,* D. Pa 1965, 239 F. Supp. 483, the Court deemed a group hospitalization-and medical-surgical expense insurance plan to be an employee benefit plan within the WPPDA. Since Congress essentially reenacted 29 U.S.C. § 303(1)and 29 U.S.C. §1003(1) of WPPDA into 29 U.S.C. §1002(1) and 29 U.S.C. §1003(1) of ERISA, the construction given by the *Wirtz* case should be viewed as the correct interpretation of the definition of an employee welfare benefit plan. *Sutherland Statutory Construction,* 4th Ed., Vol. 2A, Para 49.09.

In *Bell v. Employer Security Benefits Association* D.C. Kan 1977, 437 F. Supp 382, the Court stated that the importance of construction of term in WPPDA was clear in as much as Congress was aware of the interpretation given thereto

when it utilized it in the succeeding statute. Therefore, the legislative history and the judicial construction used under the WPPDA should be given strong weight in this determination.

Based on the foregoing, the Court's decision was clearly arbitrary. No reasonable justification was shown for this decision based on either a factual basis or established legal principals.

A BASIC TENET OF ADMINISTRATIVE LAW ESTABLISHED BY THE SUPREME COURT HAS BEEN VIOLATED BY THE COURT OF APPEALS' DENIAL OF JURISDICTION IN THIS CASE

In *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 381, 89 S.Ct. 1794, 1802, 23 L.Ed.2d 371, 384 (1969), this Honorable Court stated that:

> "The construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. . ."

Both WPPDA and ERISA gave the primary authority to administer the provisions of the Act to the Department of Labor. The Department's regulations should thus be given authoritative status by the Courts unless there are compelling reasons showing that it would be wrong to do so.

Rule 2520S 104-21 of the Rules and Regulation for Reporting and Disclosure as established by the Department of Labor a copy of which is attached hereto as Appendix 4 is instructive in regard to the position of the Department of Labor as to the coverage of SMET's Taggart Plan by ERISA. Rule

2520S 104-21 was promulgated by the Department of Labor to reduce, but not do away with, the reporting requirements of certain Employee welfare benefit plans of fewer than 100 participants.

If one were to compare the Taggart plan as established under the Security Multiple Employer Trust and the type of plan descirbed by the above regulation, the two plans would seem to mirror. The Taggart plan covers less than 100 participants. Its arrangement with SMET provides benefits to employees of at least two unaffiliated employers; and fully insures one or more welfare plans of each participating employer through insurance contracts purchased solely by the employers with all benefits payments made by the insurance company. Finally, it uses a trust (SMET) as the holder of the insurance contracts and the conduit for payment of premiums to the insurance company.

Additionally and of great importance, the Department of Labor has intervened twice in this case as Amicus Curiae to express their construction of the statute to the Court. Indeed in its brief on the original Appeal to the U.S. Court of Appeals for the 5th Circuit, the Department stated the following:

> "Thus, in the instant case, when the board of directors of the Taggart Corporation determined on December 18, 1975 to provide its employee, Kansas, with a program of health and hospitilization benefits, it established a

> single employer plan within the meaning of the Act." (p.15)

This ruling by the Court of Appeals denying jurisdiction despite the Department of Labor's regulations and explicit briefs to the contrary is all the more surprising in that the Fifth Circuit Court itself relied on the administrative tenet relating to statutory construction in a prior decision regarding ERISA jurisdiction (see *Murphy v. Inexco Oil Co.* 611 F.2d 570, p. 574).

Therefore, unless this Honorable Court can find strong indications that the Department of Labor's construction of the statute is incorrect, the Department's interpretation should be followed. It is noted that no compelling reasons were offered by the Fifth Circuit Court in its decision of either May 30, 1980 or August 29, 1980.

CONCLUSION

Why should this Honorable Court delve into the jurisdictional question presented in this case. Certainly, it can do so because a capricious decision of the Court of Appeals has deprived Appellant of his only recourse as to the breach of fiduciary duty herein to be determined. But most importantly it should do so because of the catastrophic impact of that decision upon all employees who are relying on employee benefits funded in the same manner as the Taggert plan. The employees are left with no remedy against the abuses of their fiduciaries. As to them, the Court of Appeals has turned the march of pro-

gress backwards to pre-WPPDA and pre-ERISA times.

For the foregoing reasons, petitioner respectfully prays that its Petition for Writ of Certiorari be granted and that after consideration by the Honorable Court that the denial of jurisdiction be reversed and the case remanded to the District Court for hearing on the merits.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing writ of certiorari has been forwarded to Mr. Dale Wooton, 909 One Main Place, Dallas, Texas 75250 and to Mr. Gregory Neill Jones, 800 Bank of the Southwest, Houston, Texas 77002 on this 26th day of November, 1980.

_____

SAM E. ROWLAND

APPENDIX 1

The TAGGERT CORPORATION, Stanley M. Kansas and Claire J. Kansas, Plaintiffs,

v

E. Robert EFROS, James A. Markle, William K. Robinson, Old Security Life Insurance Company, Durham Life Insurance Company, Security Insurance Services, and Life and Health Benefits Administration, Inc., Defendants.

Civ. A. No. H-77-1588.

United States District Court, S.D. Texas, Houston Division.

Aug. 21, 1979.

Plaintiff brought an action claiming unjustified termination of insurance benefits alleged to be covered by the Employee Retirement Income Security Act. On defendants' motion to dismiss and motion for summary judgment, the District Court for the Southern District of Texas, Houston Division, Cire, J., held that: (1) ERISA is a result of a congressional endeavor to curb the funding and disclosure abuses of employee pension and welfare benefit plans by establishing minimum federal standards; (2) while the Act supersedes state law regulation of employee benefit plan, the Act allows the states to continue to regulate the sale of insurance; and (3) the "Security Multiple Employers Trust" did not qualify as an "employee benefit plan" and hence district court was without jurisdiction.

Action dismissed.

1. Master and Servant 78.1(1)

The Employee Retirement Income Security Act is the result of a congressional endeavor to curb the funding and disclosure of abuses of employee pension and welfare benefit plans by establishing minimum federal standards. Employee Retirement Income Security Act of 1974, § § 2 et seq., 4(a), 514 (b)(2)(A), 29 U.S.C.A. § § 1001 et seq., 1003(a), 1144(b) (2)(A).

2. States 4.10

While the Employee Retirement Income Security Act supersedes state law regulation of employee benefit plans, the Act allows the states to continue to regulate the sale of insurance. Employee Retirement Income Security Act of 1974, § § 2 et seq., 4(a), 514(b)(2)(A). 29 U.S.C.A. § § 1001 et seq., 1003(a), 1144(b)(2)(A).

3. Master and Servant 78.1(3)

Fact that president of corporation subscribed to "Security Multiple Employers Trust" believing that he was enrolling in an employee benefit plan did not make the trust an Employee Retirement Income Security Act plan, since to be properly characterized as an ERISA plan, a plan must satisfy the Act's definition or requirements in both form and substance. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. §1001 et seq.

4. Federal Courts 192

"*Security Multiple Employers Trust*" did not qualify as an employee benefit plan" and hence district court was without subject matter jurisdiction over contract action brought

by beneficiaries of the plan, where trust was established as a profit-making enterprise by trustees and was intended to be actuarially sound, a trustee was also the organizer of the trust administrator, there was nothing to show that the trust agreement itself was ever reviewed or signed by anyone on behalf of the subscribing corporation, and while trust agreement stated that it operated on behalf of the subscribing employers, such employers were not given the control over management or operation of the trust contemplated by an ERISA plan. Employee Retirement Income Security act of 1974, §3(1,3), 29 U.S.C.A. §1002(1,3).

Cary S. Watson, Houston, Tex., for plaintiffs.

Dale Wootton, Dallas, Tex., for E. Robert Efros and James A. Markle.

Gregory Neill Jones, Houston, Tex., for Security Insurance Services.

MEMORANDUM AND ORDER

Cire, District Judge.

Plaintiffs instituted this action claiming unjustified termination of insurance benefits alleged to be covered by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001, et seq. The Defendants have filed a Motion to Dismiss and a Motion for Summary Judgment contending that this Court lacks jurisdiction.

Subject matter jurisdiction exists if the insurance plan in question, the Security Multiple Employers Trust is an

"employee benefit plan" described in 29 U.S.C. § 1003(a). Defendants argue in their motion to dismiss that the Trust is "insurance" which is subject only to state regulation.

[1,2] ERISA is the result of a congressional endeavor to curb the funding and disclosure abuses of employee pension and welfare benefit plans by establishing minimum federal standards. *Wadsworth v. Whaland*, 562 F.2d 70 (1st Cir. 1977), cert. denied, 435 U.S. 980, 98 S.Ct. 1630, 56 L.Ed.2d 72 (1978). While ERISA supersedes state law regulation of employee benefit plans, the Act allows the States to continue to regulate the sale of insurance. *Bell v. Employee Security Benefit Ass'n.*, 437 F.Supp. 382 (D. Kan. 1977); *Kerbow v. Kerbow*, 421 F.Supp. 1253 (N.D. Tex. 1976); 29 U.S.C. § 1144(b)(2)(A).

The term "employee benefit plan" is defined in 29 U.S.C. § 1002(3) as "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both. . . ." Thus, if the Trust in question is to constitute a plan covered by ERISA, it must meet the definition of an "employee welfare benefit plan" which is found in 29 U.S.C. § 1002(1):

> ". . .any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, . . .for the purpose of providing. . . through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits,. . ."

It is not disputed that the Trust meets the second portion of this definition dealing with the purpose of such a plan. The question for determination, therefore, is whether the Trust is an ERISA "employee benefit plan" that has been established or maintained by an employer as defined in 29 U.S.C. § 1002(1).

This issue has been previously addressed in the cases of *Hamberlin v. VIP Ins. Trust,* 434 F.Supp. 1196 (D. Ariz. 1977), and *Bell v. Employee Security Benefit Ass'n, supra.* Both of these cases held that the employee benefit plans under consideration contained certain characteristics which placed them within the definition of insurance and outside the traditional concept of an ERISA employee benefit plan. Following is a summary of such characteristics:

(1) The establishment of the plan by third party insurance brokers or "entrepreneurs" acting for their own interests and not on behalf of an employer individually or as a group or association;

(2) The lack of voice in the management or operation of the plan on behalf of subscirbing employers;

(3) Subscribing to the plan by employees without the knowledge of their employers;

(4) The existence of a profit-making enterprise or a plan intended to be "actuarially sound."

An additional aspect of a plan held not to be within the scope of ERISA is found in *Wayne Chemical, Inc. v. Columbus Agency Service Corp.,* 567 F.2d 692 (7th Cir. 1977):

> "An employer does not become a participant in, or establish or maintain a plan by applying for insurance and paying premiums for what it understands to be insurance without any knowledge that the plan exists. Establishing, maintaining, or participating in a plan requires an intent, which presupposes an awareness of the existence of the plan."

The Security Multiple Employers Trust was first established by Defendants, E. Robert Efros and William K. Robinson, in the State of Arizona. The Trust which is the subject of this lawsuit was established by Defendants Efros, Robinson, and James A. Markle in Dallas, Texas. These three Defendants are the Trustees and they appointed Defendant, Life and Health Benefits Administration, Inc., as the administrator of the Trust for the State of Texas.

The Trust Agreement declares that it is made between the Trustees and the subscribing employers. An employer becomes a party to the Trust either by executing a full counterpart of the Agreement itself, or by submitting a separate subscription agreement. The Trust requires all premiums to be paid by the subscribing employers and gives the Trustees the authority to apply for a group insurance policy and the "discretion to determine. . . which benefits shall be provided for and the character and amount of each benefit as the trust fund may afford." The trust further provides that any group insurance policy issued shall be in the name of the Trustees, and the Trustees shall be the owners of such policy and they shall determine the

terms and conditions of eligibility of employees for the purposes of the Trust.

The affidavit of Linda Markle President of Life and Health Benefits Administration, Inc., states that the Trust was established as a profit-making enterprise by the Trustees and it is intended to be actuarially sound. James A. Markle, Trustee, is also the organizer of Life and Health Benefits Administration, the Trust Administrator. Ms. Markle's affidavit also notes that in some cases "employers themselves are not insured, but have merely allowed their employees to apply for coverage." Participants or applicants in the Trust are solicited by agents of Life and Health Benefits Administration on a commission basis.

The Taggert Corporation subscribed to the Trust on behalf of its sole employee, Stanley M. Kansas, by submitting a separate subscription agreement and enrollment card to Life and Health Benefits Administration in December 1975. Both documents were signed and submitted by Stanley M. Kansas. On April 30, 1976, the Taggert Corporation was notified that it had become a subscribing employer of the Trust. Affidavits submitted by Plaintiff, Stanley M. Kansas, and Kenneth J. Bozak, a former director and vice-president of Plaintiff, Taggert Corporation, state that they were led to believe that the Trust was an ERISA plan. Their belief was based upon a letter sent to the Taggert Corporation by Life and Health Benefits Administration outlining certain ERISA requirements applicable to the Trust.

The Trust Agreement attached to the Plaintiff's response to the motion to dismiss is dated March 1, 1975, and is signed only by the three Trustees. There is nothing in the pleadings and affidavits of the Plaintiffs to suggest that the Trust Agreement itself was ever reviewed or signed by anyone on behalf of the subscribing Taggert Corporation. However, it is clear that the Plaintiffs were aware of the existence of the Trust.

[3] While the Trust Agreement states that it operates on behalf of its subscribing employers, such employers are not given the control over management or operation of the Trust Contemplated by and ERISA plan. See *Hamberlin v. VIP Insurance Trust, supra,* at 1198. The profit-making aspects of the Trust coupled with the fact that it was established by third parties having business ties to the Trust Administrator suggest that the Trust more closely resembles the "proprietary insurance venture" arrangements discussed in the *Bell, Hamberlin, and Wayne Chemical cases, supra.* As a commercial venture intended to be actuarially sound, the Security Multiple Employers Trust falls outside the traditional concept of an employee benefit plan. *Bell v. Employee Security Benefit Ass'n, supra,* at 391-392. The requisite intent or awareness on the part of the Taggert Corporation in the establishment, maintenance, and participation in a plan intended to be for the benefit of its employees is lacking herein. The circumstances surrounding the submission of the subscription agreement by Stanley M. Kansas, as President of the Taggert Corporation, for the benefit of Stan-

ley M. Kansas and his family, and the subsequent acceptance of the Taggert Corporation as a participant in the Trust are similar to those found in *Wayne Chemical, Inc. v. Columbus Agency Service Corp., supra,* at 699, note 12. The transaction simply involves the purchase of insurance by Plaintiff, Stanley M. Kansas, for himself and his family. The fact that he subscribed to the Trust as President of the Taggert Corporation, believing that he was enrolling in an employee benefit plan, does not make the Trust an ERISA plan. To be properly characterized as an ERISA plan, a plan must satisfy the Act's definitional requirements in both form and substance. *Hamberlin v. VIP Insurance Trust, supra,* at 1199.

[4] Based upon the foregoing, this Court concludes that the Security Multiple Employers Trust does not qualify as an ERISA employee benefit plan and the Defendants' Motion to Dismiss is granted. Plaintiffs' complaint and action are dismissed for lack of subject-matter jurisdiction.

APPENDIX 2

The TAGGERT CORPORATION et al.,

Plaintiffs-Appellants,

v.

LIFE AND HEALTH BENEFITS ADMINISTRATION, INC., et al.,

Defendants-Appellees

No. 79-3285

Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

May 30, 1980

Employer and others brought suit under the Employee Retirement Income Security Act to obtain health insurance benefits assertedly due the employers sole employee and the employee's wife. The United States District Court for the Southern District of Texas, George E. Cire, J., held that the employer was not a participant in a plan covered by ERISA and, hence, there was no subject-matter jurisdiction. The employer and its employee appealed, and the Court of Appeals, James C. Hill, Circuit Judge, held that: (1)an "employer's trust" which provided group insurance to employers too small to qualify for group rates on their own and which was a proprietary enterprise established and operated by independent businessmen for their personal profit was not a "plan" within the scope of ERISA; (2)the fact that the employer subscribed to the trust and thus obtained health insurance for its employee was not sufficient in itself to establish a single employer welfare plan

covered by ERISA; and (3)as a consequence, the employer and its single employee had no right of action under ERISA to obtain benefits from the health insurance carrier chosen by the "employer's trust."

Affirmed.

1. Master and Servant 78.1(1)

Trust which provided group insurance for employers too small to qualify for group rates on their own was neither established nor maintained by a statutory employer or employee organization and thus was not covered by the Employee Retirement Income Security Act of 1974 where the trust was a proprietary enterprise, established and operated by independent businessmen for their personal profit and where the trust acted as a mere conduit for hundreds of unrelated subscriber customers for which it forwarded premium payments to a group insurer and no employer participated in the trust's day-to-day operation or administration. Employee Retirement Income Security Act of 1974, § 3(1,4,5), 29 U.S.C.A. § 1002(1).

2. Master and Servant 78.1(1)

Fact that employer subscribed to employer's trust which provided group insurance to employers too small to qualify for group rates on their own did not establish a single employer welfare plan covered by the Employee Retirement Income Security Act where, the role of the trust, which was a proprietary enter[illegible] established and operated by independent businessmen for their personal profit, was solely to pool premiums obtained from subscribers and to purchase insurance

on their behalf and where the employer did not participate in the trust's operation or administration or assume any responsibility for the policy or its benefits. Employee Retirement Income Security Act of 1974, §3(1,4,5), 29 U.S.C.A. §1002(1).

3. Master and Servant 78.1(1)

The Employee Retirement Income Security Act does not regulate bare purchases of health insurance when the purchasing employer neither directly nor indirectly owns, controls, administers or assumes responsibility for the policy or its benefits. Employee Retirement Income Security Act of 1974, §§ 2-4082, 3(1), 502, 29 U.S.C.A. §§ 1001-1381, 1002(1), 1132.

4. Master and Servant 78.1(1)

Words "plan, fund, or program" as used in the Employee Retirement Income Security Act could not fairly be said to describe employer's subscription to "multiple employers trust," a proprietary enterprise which acted as a kind of insurance mutual fund to provide group insurance to employers too small to qualify for group rates on their own, where the purported "plan" arising from the employer's subscription had no assets and was liable for no benefits and the role of the employer in relation to the trust was simply to make premium payments which the trust pooled with those of other employers and forwarded to a group insurer. Employee Retirement Income Security Act of 1974, §3(1,4,5), 29 U.S.C.A. § 1002(1).

See publication Words and phrases for other judicial constructions and definitions.

5. Master and Servant 78.1(8)

Where there was no "plan, fund, or program" within the meaning of the Employee Retirement Income Security Act, employer had no right of action under ERISA when employee's claim for benefits for his wife was denied because of alleged misrepresentations in the insurance application. Employee Retirement Income Security Act of 1974, § 502, 29 U.S.C.A. §1132.

6. Federal Courts 18

Where there was no federal subject-matter jurisdiction, the district court properly dismissed plaintiffs' pendent claims as well.

Appeal from the United States District Court for the Southern District of Texas.

Before HILL, GARZA and THOMAS A. CLARK, Circuit Judges.

JAMES C. HILL, Circuit Judge:

The Security Multiple Employers Trust [SMET], appellee, provides group insurance to employers too small to qualify for group rates on their own. Employers subscribe to SMET and thereby become members of SMET's "group" of subscribers; SMET then pools the "group's" premiums and purchases insurance on their behalf. Taggart Corp., appellant, whose sole employee is Stanley M. Kansas, appellant, subscribed

to SMET in 1976. Kansas and his family thereupon enjoyed health insurance protection, via SMET, from a carrier of SMET's choosing. Kansas claimed benefits for his wife in March, 1977. SMET subsequently informed Kansas that the trust carrier was denying coverage because of alleged misrepresentations in his insurance application. Kansas responded by bringing the instant lawsuit under 29 U.S.C.A. §1132 (West 1975), which extends federal jurisdiction to enforce benefits due beneficiaries of federally regulated "employee welfare benefit plan[s]." 29 U.S.C.A. § 1002(1) (West 1975). The district court held that SMET was not such a "plan," within the statutory definition, and accordingly granted defendants' motion to dismiss for lack of subject matter jurisdiction. *Taggert [sic] Corp. v. Efros,* 475 F.Supp. 124 (S.D. Tex. 1979). *See* Fed.R.Civ.P. 12(b)(1). Taggart and Kansas appeal.

[1] Whether this insurance case belongs in federal court turns on whether SMET is covered by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.A. § § 1001-1381 (West 1975 & Supp. 1979). Appellants urge that SMET is an "employee welfare benefit plan," by which they mean

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance

> or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment. . ..

29 U.S.C.A. § 1002(1) (West 1975). We agree with both the district court and the Secretary of Labor, who filed an Amicus Brief, that SMET was neither established nor maintained by a statutory "employer" or "employee organization," *see* 29 U.S.C.A. §§ 1002(4), 1002(5) (West 1975), and hence falls without the scope of ERISA.

SMET is a proprietary enterprise, established and operated by independent businessmen for their personal profit. As a kind of insurance mutual fund, SMET acts as mere conduit for hundreds of unrelated subscriber customers, forewarding premium payments to a group insurer. Neither Taggart Corp. nor any other employer participates in SMET's day-to-day operation or administration. The venture was established and is "maintained by entrepreneurs for the purpose of marketing products or services to other . . . [Such an enterprise is neither] established [n]or maintained by the appropriate parties to confer ERISA jurisdiction." H.R.Rep. No. 94-1785, 94th Cong., 2d Sess. 48 (1977), quoted in *Private Medical Care Foundation, Inc. v. Califano,* 451 F.Supp. 450, 461 (W.D. Okl. 1977). *See Wayne Chemical, Inc. v. Columbus Agency Service Corp.,* 567 F.2d 692 (7th Cir. 1977); *Bell v. Employee Security Benefit Association,* 437 F.Supp. 382 (D.Kan. 1977).

[2,3] While agreeing with the preceding conclusion, the Secretary of Labor urges us nonetheless to uphold federal juris-

diction in this case by declaring that Taggart Corp.'s *subscription to SMET* itself "established a single employer welfare plan." Brief for Secretary of Labor as Amicus Curiae at 15. We reject this suggestion. Considering the history, structure and purposes of ERISA, we cannot believe that that Act regulates bare purchases of health insurance where, as here, the purchasing employer neither directly nor indirectly owns, controls, administers or assumes responsibility for the policy or its benefits. This conclusion draws support from various quarters.

[4] ERISA's legislative history demonstrates that its drafters were principally concerned with abuses occurring in respect of private pension assets. "The assets of private plans, estimated to be in excess of $150 billion, constitute the only large private accumulation of funds which [sic] have [sic] escaped the imprimatur of effective federal regulation." H.R.Rep. No. 93-533, 93rd Cong., 2d Sess. 3, *reprinted in* [1974] U.S. Code Cong. & Admin. News, pp. 4639, 4641. To forestall misappropriation and misuse of such funds, Congress mandated that all employee benefit plans be established in the form of a trust, 29 U.S.C.A. §1103 (West 1975), subject to federal standards of fiduciary duty. 29 U.S.C.A. §1104 (West 1975). Congress acted further to assure the integrity of employee benefits by mandating annual reports. 29 U.S.C.A. § 1023 (West 1975), containing both actuarial data and certified financial statements. For enforcement purposes, ERISA "plans" are suable entities, 29 U.S.C.A. § 1132(d)(1) (West 1975). In light of this statutory framework, we think the words "plan, fund, or program," 29

U.S.C.A. § 1002(1) (West 1975), cannot fairly be said to describe Taggart's subscription to SMET.

The supposed Taggart "plan" has no assets and is liable for no benefits. There is nothing to be placed in trust, so there is no trust. The corporation did no more than make payments to a purveyor of insurance, patently for tax reasons. *See* I.R.C. §§ 104-06; Treas. Reg. § 1.162-10, 26 C.F.R. § 1.162-10 (1978). There simply exist no assets for ERISA's statutory safeguards to protect. Nor do the statute's vesting and funding goals militate in favor of finding a "plan" here, since those provisions expressly except "welfare" plans from their coverage. 29 U.S.C.A. §§ 1051(1), 1081(a)(1) (West 1975). On the other hand, Congress has elsewhere clearly distinguished between "health plans" and "health insurance." I.R.C. §§ 105(a), 105(e). As with pension plans, *see* H.R.Rep. No. 93-807, 93rd Cong., 2d Sess. 1, *reprinted in* [1974] U.S. Code Cong. & Admin. News, pp. 4670, 4670; *compare* 29 U.S.C.A. §§ 1052-82 (West 1975) *with* I.R.C. §§410-12, legislative reform of welfare plans has been effected in part through amendment of the Internal Revue Code. *See* Revenue Act of 1978, § 366, 26 U.S.C.A. § 105(h) (West Supp. 1979). These complementary Code provisions may reasonably be construed *in pari materia* with ERISA reforms located in Title 29. *See Erlenbaugh v. United States*, 409 U.S. 239, 243-44, 93 S.Ct. 477, 480, 34 L.Ed.2d 446 (1972). In this connection, we observe that I.R.C. § 105 distinguished between "accident or health insurance," § 105(a), and "accident or health plan[s]." § 105(e).

That Congress has thus chosen to treat the two separately reinforces our conclusion that ERISA "plans" are broader in concept than pure insurance transactions of the sort involved here.

[5,6] It is not surprising that appellants have refrained from adopting the Secretary's line of argument. Taggart Corp. has not taken the first step toward bringing a "single employer benefit plan" into compliance with ERISA. Acceptance of the Secretary's position conceivably could result in Taggart's criminal prosecution. 29 U.S.C.A. § 1131 (West 1975). No such anomalous result is required on the facts of this case. We hold that neither SMET nor Taggart's subscription to SMET constitutes a "plan, fund, or program," within the meaning of 29 U.S.C.A. § 1002(1) (West 1975), and that appellants accordingly have no right of action under 29 U.S.C.A. § 1132 (West 1975). Federal subject matter jurisdiction being thus absent, the district court properly dismissed appellants' pendent claims as well. *E.g. Daniels v. All Steel Equipment, Inc.*, 590 F.2d 111, 114 (5th Cir. 1979); *Morgan v. Odem*, 522 F.2d 147, 149 (5th Cir. 1977) (per curiam). Our decision, of course, leaves appellants free to pursue their insurance claims in an appropriate state court. *See, e.g., Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977) (per curiam); *Mann v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 488 F.2d 75,76 (5th Cir. 1973) (per curiam).

AFFIRMED.

APPENDIX 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-3285

THE TAGGART CORPORATION,
ET AL.,

Plaintiffs-Appellants,

versus

LIFE AND HEALTH BENEFITS
ADMINISTRATION, INC.,
ET AL.,

Defendants-Appellees.

- - - - - - - -

Appeal from the United States District Court for the
Southern District of Texas

- - - - - - - -

ON PETITION FOR REHEARING

(August 29, 1980)

Before HILL, GARZA and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

APPENDIX 4

Rule 2520S 104-21 of the Rules and Regulation for Reporting and Disclosure as established by the Department of Labor states the following:

> (a) Scope. Under the authority of section 104(a)(3) of the Act, the administrator of any employee welfare benefit plan which covers fewer than 100 participants at the beginning of the plan year and which meets the requirements of paragraph (b) of this section is exempted from certain reporting and disclosure provisions of the Act. Specifically, the administrator of such plan is not required to file with the Secretary any of the following documents: . . .
>
> (b) Application. This exemption applies only to welfare plans, each of which has fewer than 100 participants at the beginning of the plan year and *which are part of a group insurance arrangement* if such arrangement:
>
> 1. *Provides benefits to the employees of two or more unaffiliated employers,* but not in connection with a multiemployer plan as defined in section 3(37) of the Act and any regulations prescribed under the Act concerning section 3(37);
>
> 2. Fully insures one or more welfare plans of each participating employer *through insurance contracts purchased solely by the employers* or purchased

partly by the employers and partly by their participating employees, with all benefit payments made by the insurance company: Provided, That -

(i) Contributions by participating employees are forwarded by the employers within three months of receipt,

(ii) Refunds, to which contributing participants are entitled, are returned to them within three months of receipt, and

(iii) Contributing participants are informed upon entry into the plan of the provisions of the plan concerning the allocation of refunds; and

3. *Uses a trust* (or other entity such as a trade association) *as the holder of the insurance contracts and the conduit for payment of premiums* to the insurance company.

(c) Limitations. This exemption does not exempt the administrator of an employee benefit plan from any other requirement of Title 1 of the Act, including the provisions which require that plan administrators furnish copies of the summary plan description to participants and beneficiaries (section 104(b)(1)), file an annual report with the Secretary of Labor (section 104(a)(1)(A) and furnish certain documents to the Secretary of Labor request (section 104(1)(1), and authorize the Secretary of Labor to collect information and data from employee benefit plans for research and analysis (section 513). (emphasis added)

NO. 80-1126

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE TAGGART CORPORATION, STANLEY M. KANSAS AND CLAIRE JEAN KANSAS

Petitioners,

v.

E. ROBERT EFROS, JAMES A. MARKLE, WILLIAM K. ROBINSON, OLD SECURITY LIFE INSURANCE COMPANY, DURHAM LIFE INSURANCE COMPANY, SECURITY INSURANCE SERVICES, AND LIFE AND HEALTH BENEFITS ADMINISTRATION, INC.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONSE OF JAMES A. MARKLE AND LIFE AND HEALTH BENEFITS ADMINISTRATION, INC.

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Administration, Inc.

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NO. 80-1126

IN THE

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OCTOBER TERM, 1980

THE TAGGART CORPORATION, STANLEY M. KANSAS AND CLAIRE JEAN KANSAS

Petitioners,

v.

E. ROBERT EFROS, JAMES A. MARKLE, WILLIAM K. ROBINSON, OLD SECURITY LIFE INSURANCE COMPANY, DURHAM LIFE INSURANCE COMPANY, SECURITY INSURANCE SERVICES, AND LIFE AND HEALTH BENEFITS ADMINISTRATION, INC.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONSE OF LIFE AND HEALTH BENEFITS ADMINISTRATION, INC. AND JAMES A. MARKLE

LIFE AND HEALTH BENEFITS ADMINISTRATION, INC., (LHBA) and JAMES A. MARKLE, submit this response to the Petition for Writ of Certiorari filed by The Taggart Corporation, Stanley M. Kansas and Claire Jean Kansas seeking review of the Fifth Circuit's decision in 617 F.2d 1208. The basis for the Court's jurisdiction and the statutes involved

are set forth in the petition filed by The Taggart Corporation, et al.

CITATIONS TO OPINIONS BELOW

The judgment and opinion of the District Court is reported at 475 F. Supp. 124. The opinion of the United States Court of Appeals for the Fifth Circuit dated May 30, 1980 (Circuit Judges, Hill, Garza and Clark) is reported at 617 F.2d 1208. That opinion is incorrectly cited by Petitioner as "F.2d 6011".

STATEMENT OF THE CASE

Petitioners' statement of the Case is essentially correct and needs no further amplification.

COUNTER STATEMENT OF THE FACTS

The Security Multiple Employers Trust (SMET) was established in 1975 to provide an opportunity for small employers to offer life and health insurance to their employees.

This marketing vehicle was made possible by the Insurance Code of the State of Texas, V.A.T.S., article 3.50 §§ 1(1), (5) and article 3.51-6 §§ 1(1), (3) (West 1963).

All policy forms, certificates, marketing material, and enrollment forms are filed with the Insurance Department of the State of Texas and approved by them in compliance with the State Insurance Code.

On December 18, 1975, the Taggart Corporation made written application to the SMET on a subscription agreement and their sole employee, STANLEY KANSAS, submitted an enrollment card for himself

and his family, and coverage was extended based on the application.

On October 17, 1976, son Brian was admitted to the hospital for a strep infection and a claim of $587.47 was paid.

On December 27, 1976, Mrs. Kansas was admitted to the hospital for the first of three (3) confinements. The second confinement commenced on January 12, 1977, for a vein stripping and the third was on February 28, 1977, for a possible pulmonary embolism. The amount of the claims were: $510.30 for the first claim, $1,298.77 for the second claim, and $429.05 for the third claim, or a total of $2,238.12.

However, only the first claim of $510.30 would be payable under the terms of the policy since the second claim was for "elective surgery" and therefore was excluded by the terms of the certificate of coverage, and the third confinement was in relation to the elective surgery.

In routine investigation of Mrs. Kansas' claim, medical records were requested from the hospital. Upon examination of these records, it was found that Mrs. Kansas had a long history of varicose veins and a previous vein-stripping which was not reported on the application for insurance coverage with the SMET. Further investigation revealed that Mrs. Kansas had been treated for a leg injury in 1973 and "busted veins" in 1975, two months prior to the submission of the application for coverage. None of this medical history was reported on the enrollment card as required.

On June 24, 1977, Mr. Kansas' dependent coverage was cancelled for misstatement on the medical portion

of the application submitted for coverage. All dependents had to be terminated because of a "true composite rating system", an average family rate which covers all dependents. Under this rating system, when it becomes necessary to cancel coverage for one dependent, all dependent coverage must be cancelled.

After the termination of dependent coverage, a claim with a possible liability to the insurance company was submitted on son Brian, in the amount of $229.71 and was denied due to termination of dependent coverage.

Mr. Kansas' insurance was terminated effective April 31, 1977, for non-payment of premium.

The Taggart Corporation and Mr. Kansas then filed this suit, claiming violations of ERISA and other breaches of fiduciary duty by the administrator of the Trust, Life and Health Benefits Administration, Inc., (LHBA).

SUMMARY OF ARGUMENT

The simple fact of this case is that it is a claim by a purchaser of insurance against an insurance carrier for not paying a claim and cancelling a policy because of misstatement on the application. If the appellants prove that the claim should have been paid and the policy not cancelled, then they will prevail in the state court. If, on the other hand, the evidence shows that there was a misstatement and that the claim was properly denied and the coverage properly cancelled, then they will lose.

This is in essence a classic case between a policyholder and an insurance carrier where the rights and remedies of the policyholder are determined by state

law. There is no valid reason or justification for the application of ERISA to these facts.

The District Court and the Court of Appeals for the Fifth Circuit found no policy or legal reasons for the imposition of federal jurisdiction based upon these facts under ERISA.

The issue presented by the Petition is of such minor importance in the overall structure of ERISA and the policy reasons for its implementation, that consideration by the Court is not essential. The decision of the Court of Appeals for the Fifth Circuit was correct and fully in accord with other cases which have interpreted the same provisions of ERISA, and which have found no basis for jurisdiction.

There is no basis for Petitioner's claim that the decision below will have a "devastating impact" on the rights and protection granted by Congress to Employee Benefit Plans, or Petitioner's claim that trusts such as the SMET, if not properly controlled by ERISA, will be left unchecked by federal or state law.

The opinion below clearly points out that appellants will be free to pursue their insurance claims in an appropriate state court. (Appendix 2, Appellants Petition, page A-18) As a matter of fact, the Appellants are currently pursuing such a claim in the state courts, and are claiming a right of recovery under state law of treble damages and attorneys fees, pursuant to the Texas Deceptive Trade Practices — Consumer Protection Act. Texas Business and Commerce Code, § 17.41 et seq. (West 1973)

REASONS FOR DENYING WRIT

I.

THE DECISION OF THE FIFTH CIRCUIT WAS CORRECT AND IN LINE WITH THE PREVIOUS CASES CITED BY THE COURT.

The first requirement that the Appellant had to meet in order to establish that there is jurisdiction under ERISA, is that there is an "employee benefit plan". Employee Retirement Income Security Act of 1974 (ERISA) 29 USC § 1001, et seq. The court below correctly found that there was no such "plan".

First, the Court below agreed with the District Court and the Secretary of Labor, who filed an Amicus Brief, that SMET was neither established nor maintained by a statutory "employer" or "employee organization" and hence falls without the scope of ERISA.

The lower Court's opinion in this case does not foreclose ERISA protection to beneficiaries under a proper qualifying ERISA plan. The Court merely held that under the facts in this case the Taggart Corporation did not have such a plan.

The Court below cited with approval the decisions in *Wayne Chemical, Inc. v. Columbus Agency Service Corp.*, 567 F.2d. 692 (7th Cir. 1977) and *Bell v. Employee Security Benefit Association*, 437 F. Supp. 382 (D. Kan., 1977), which were also cited by the District Court.

In examining the legislative history of the Act, the court noted that where:

> "The venture was established and is maintained by entreprenuers for the purpose of marketing products or services to other. . . . [Such an en-

> terprise is neither] established or maintained by the appropriate parties to confer ERISA jurisdiction." citing H. R. Rep. No. 94-1785, 94th Cong., 2d Sess. 48 (1977), as quoted in *Private Medical Care Foundation Inc. v. Califano*, 451 F. Supp. 450, 461 (W. D. Okla. 1977) (Appendix 2, Appellants Petition p. A-15)

The Court then rejected the position of the Secretary of Labor that Taggart Corporation's "subscription to SMET" itself "established a single employer welfare plan". The Court correctly pointed out that the history, structure and purpose of ERISA was not to regulate "bare purchases of health insurance, where the purchasing employer neither directly nor indirectly owns, controls, administers or assumes responsibility for the policy or its benefits." (Appendix 2, Appellants Petition, p. A-16)

Appellants argue, on the other hand, that they do assume such responsibility by the payment of premiums and administrative costs. This argument escapes all logic. If this argument was valid, then an insurance policyholder in Los Angeles who paid a premium for his coverage to an insurance company in New York City could argue that he "assumes responsibility for the policy or its benefits."

The Appellant then continues the strained logic by stating that the Taggart Corporation controls the policy through the trust agreement which gives the Taggart Corporation and other employees the power to replace the trustees and even terminate the trust. The District Court opinion clearly disposes of this argument by pointing out that:

"There is nothing in the pleadings and affidavits of the Plaintiffs to suggest that the trust agreement itself was ever reviewed or signed by anyone on behalf of the subscribing Taggart Corporation. . . . The requisite intent or awareness on the part of the Taggart Corporation in the establishment, maintenance and participation in a plan intended to be for the benefit of its employees is lacking herein. . . . The transaction simply involves the purchase of insurance by Plaintiff, STANLEY M. KANSAS, for himself and his family. . . . " (Appendix 1, Appellants Petition, pp. A-8, 9)

II.

THE APPELLANTS HAVE AN ADEQUATE REMEDY IN THE STATE COURTS AND ARE CURRENTLY PURSUING THAT REMEDY.

Appellant recognizes the accuracy of the statement by the Court of Appeals in its opinion that its decision leaves them free to pursue their insurance claim in the appropriate state court, but then alleges that it does not apply to Appellants "present claim regarding a breach of fiduciary duty which is not regulated by state insurance laws." This statement by the Appellant should show to the Court the very "narrow" nature of this appeal and the limited application of the point presented.

Appellants do not describe what terrible fate will befall them if they only prevail in the state Court on their insurance claim and not on their claim for breach of fiduciary duty. Nor do they explain why the Court's statement does not apply to their claim of breach of fiduciary duty, since such a claim has historically been recognized in the courts of the State of Texas.

Appellants claim that there is no remedy under state insurance law for a breach of fiduciary duty. As a matter of fact, however, the Plaintiffs alleged in Paragraph XV of their Original Complaint filed in the Federal District Court that they were "damaged by Defendants misrepresentations and breach of its fiduciary duty to Plaintiffs. . . ." and that the "Texas Business and Commerce Code, Section 17.50 authorizes in such circumstances that Plaintiff is entitled to and should be awarded three times the amount of Plaintiffs actual damages. . . . and reasonable attorney's fees. . . ."

Not only does the Appellant have a remedy, he has a cause of action for treble damages and attorney's fees!

Furthermore, the Appellants are currently pursuing their claim in the state court as the Fifth Circuit opinion expressly allowed them to do. On November 21, 1977 the Appellants filed a suit in the 215th Judicial District Court of Harris County, Texas making essentially the same claims as made in the Original Complaint filed herein. The Plaintiffs Original Petition in the state court also includes the claim for treble damages and attorney's fees under the Texas Deceptive Trade Practices Act, as well as the claim of "breach of fiduciary duty" under the Texas Business and Commerce Code, § 17.50.

Plaintiffs even claim in their state court suit that "the Defendants actions have been in violation of the Insurance Code of the State of Texas and regulations promulgated thereunder." At the same time the appellants are making these claims in the state court, they are representing to this Honorable Court, that

"the Fifth Circuit Court of Appeals is denying Appellants only avenue of redress. . . ." (Appellants Petition p. 9) and that the "Court of Appeals has deprived Appellant of his only recourse as to the breach of fiduciary duty herein to be determined." (Appellants Petition p. 15)

III.

THERE IS NO CONFLICT AMONG THE CIRCUITS AND THE OPINION OF THE FIFTH CIRCUIT IN QUESTION IS IN ACCORD WITH THE SEVENTH CIRCUIT.

The decision has no serious or important social consequence to the nations employers or employees since the Courts aren't refusing to take jurisdiction over valid ERISA plans. This was a mere insurance transaction with more than ample remedies for any wrongful conduct under state law.

More importantly, there is no conflict among the circuits on this issue. As a matter of fact, the only other decision of an appellate court on this question is the opinion of the 7th Circuit in *Wayne Chemical, Inc. v. Columbus Agency Service Corporation, supra* which is in accord with the opinion of the Fifth Circuit and was cited by both the Fifth Circuit and the District Court.

As Chief Justice Taft wrote in *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923):

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those Courts in the nine circuits, and, second, to bring up cases involving questions of

> importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

This case does not meet either requirement suggested by Chief Justice Taft.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing Response to Petition for Writ of Certiorari has been forwarded to Mr. Sam Rowland, 333 West Loop North, Suite 218, Houston, Texas 77024, on this 5th day of March, 1981.

DALE WOOTTON